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No. 04-1397

IN THE

Supreme Court of the United States

EDWARD GERBER, JESSE VALADEZ, and FRED LAWRENCE,

Petitioners,

v.

EMMANUEL SENYO AGYEMAN,

Respondent.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a split in the circuit courts regarding the appointment of counsel to indigent litigants under 28 U.S.C. § 1915(e)(1) where every circuit applies a discretionary, case-by-case analysis of whether an attorney should be appointed to guarantee a litigant meaningful access to the courts?

2. Whether the United States Court of Appeals for the Ninth Circuit properly held that Respondent, an indigent civil detainee, should have been appointed counsel pursuant to 28 U.S.C. § 1915(e)(1) in light of Respondent's exceptional circumstances and the complexity of his case?

PARTIES TO THE PROCEEDING IN THE NINTH CIRCUIT

Respondent Emmanuel Agyeman was a non-criminal detainee of the Immigration and Naturalization Service ("INS") held primarily at the Eloy Detention Center in Arizona, which is owned and operated by the Corrections Corporation of America ("CCA"). Respondent brought a civil action against Petitioners and other Defendant-Appellees claiming excessive force and imposition of retaliatory segregation. Respondent repeatedly requested the appointment of counsel under 28 U.S.C. § 1915(e)(1) and was denied by the district court.

Petitioners are prison guards and wardens employed by the CCA who were three of the individually named defendants in Respondent's action for excessive force and retaliation.

Additional Defendants-Appellees in the proceedings below, not represented on brief by Petitioners, include the Corrections Corporation of America, Zurich Insurance Company and several other individual prison guards and wardens employed by the CCA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING IN THE NINTH CIRCUIT	ii
TABLE OF AUTHORITIES	iv
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
FEDERAL STATUTE AT ISSUE	2
INTRODUCTION	2
COUNTER STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	7
REASONS FOR DENYING THE PETITION	8
I. THE NINTH CIRCUIT *AGYEMAN* OPINION IS NOT IN CONFLICT WITH ANY OTHER U.S. COURT OF APPEALS ON AN IMPORTANT MATTER	8
A. There is no Genuine "Split"—All Circuits Apply Consistent Legal Principles When Evaluating Requests for Counsel	9
B. *Agyeman* is Not in Conflict with the Decision of Any Circuit Court	14
C. *Agyeman* is Confined to its Facts and Does Not Present an Important Federal Question	18
II. THE NINTH CIRCUIT'S DECISION IS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS	21
CONCLUSION	24

TABLE OF AUTHORITIES

CASES Page

Abdul-Wadood v. Duckworth,
860 F.2d 280 (7th Cir. 1988) 23
Agyeman v. Corrections Corp. of Am., 390 F.3d
1101 (9th Cir. 2004)..... 12, 19
Bounds v. Smith, 430 U.S. 817 (1977)..... 9, 10
Branch v. Cole,
686 F.2d 264 (5th Cir. 1982) 12
Castillo v. Cook Cty Mail Room Dep't,
990 F.2d 304 (7th Cir. 1993) 13
Casey v. Lewis,
834 F. Supp. 1553 (D. Ariz. 1992), *injunction rev'd on other grounds, Lewis v. Casey*, 518 U.S. 343 (1996)..... 5
Childs v. Duckworth,
705 F.2d 915 (7th Cir. 1983) 10, 15, 23
Cookish v. Cunningham,
787 F.2d 1 (1st Cir. 1986)..... 11, 15
Davidson v. Goord,
259 F. Supp. 2d 238, (W.D.N.Y. 2003)..... 15
DesRosiers v. Moran,
949 F.2d 15 (1st Cir. 1991)..... 11
Ekanem v. Health & Hospital Corp. of Marion County, 589 F.2d 316 (7th Cir. 1978)..... 14
Farmer v. Haas,
990 F.2d 319 (7th Cir. 1993), *cert denied*, 510 U.S. 963 (1993)..... 9, 12
Hendricks v. Coughlin,
114 F.3d 390 (2nd Cir. 1997).....16, 20, 22, 23, 24
Hill v. Davidon,
844 F. Supp. 237 (E.D. Pa. 1994)..... 15
Hodge v. Police Officers,
802 F.2d 58 (2nd Cir. 1986)..... *passim*
Lockert v. Faulkner,
574 F. Supp. 606 (N.D. Ind. 1983) 13

TABLE OF AUTHORITIES—Continued

Page

Maclin v. Freake,
650 F.2d 885 (7th Cir. 1981) ..... *passim*
Mallard v. U.S. Dist. Court for S.D. Iowa,
490 U.S. 296 (1989)..... 10
McCarthy v. Weinberg,
753 F.2d 836 (10th Cir. 1985) 12, 18, 22
Merritt v. Faulkner,
697 F.2d 761 (7th Cir. 1983) 10
Poindexter v. F.B.I.,
737 F.2d 1173 (D.C. Cir. 1984)..... 13
Rice v. Sioux City Memorial Park Cemetery Inc.,
349 U.S. 70 (1955)..... 18, 19
Strickler v. Waters,
989 F.2d 1375 (4th Cir. 1993) 23
Tabron v. Grace,
6 F.3d 147 (3rd Cir. 1993) ..... *passim*
U.S. v. 30.64 Acres of Land,
795 F.2d 796 13
Whisenant v. Yuam,
739 F.2d 160 (4th Cir. 1984) 10, 12
Wilborn v. Escalderon,
789 F.2d 1328 (9th Cir. 1986) 12

STATUTES

28 U.S.C. § 1254(1)..... 2
28 U.S.C. § 1915..... 9
28 U.S.C. § 1915(e)(1)..... *passim*
42 U.S.C. § 1983..... 5, 15
42 U.S.C. § 2000e-5(f)(1)..... 13
510 U.S. 1196 (1994)..... 9
Sup. Ct. R. 10(a) 8

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OPINION AND JUDGMENT BELOW

The unpublished order of the district court appears at Appendix 7a-10a to Petitioners' Brief. ("Pet. Br." or "Pet. App."). The opinion of the court of appeals (Pet. App. 1a-6a) is available at 390 F.3d 1101 (9th Cir. 2004).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on December 6, 2004. A timely petition for rehearing was denied by the Court of Appeals on January 13, 2005. (Pet. App. 11a). The Petition for a Writ of Certiorari was docketed with the Court on April 20, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE AT ISSUE

28 U.S.C. § 1915(e)(1) provides that in any proceedings in forma pauperis, "[t]he court may request an attorney to represent any person unable to afford counsel."

INTRODUCTION

This case does not merit a grant of certiorari. There is no split between circuits on the issue of appointment of counsel, as every court in every circuit conducts a discretionary analysis, weighing a litigant's particular circumstances to determine whether an attorney should be appointed to ensure meaningful access to the courts. The *Agyeman* opinion is well supported by the unique circumstances at issue, and is fully consistent with the law of the Ninth and every other circuit.

Respondent here was a non-criminal detainee with no meaningful access to a law library and pursuing a complex lawsuit that hinged largely on credibility issues. The Ninth Circuit found that, given Respondent's exceptional circumstances, the district court had abused its discretion by denying the appointment of counsel. The holding is confined to an unusual set of facts, and does not present any concerns, as Petitioner suggests, that counsel will now be required in all prisoner lawsuits. For these reasons and the reasons discussed below, the petition for a writ of certiorari should be denied.

COUNTER STATEMENT OF THE CASE

As the Ninth Circuit's opinion made clear, the facts surrounding Respondent Emmanuel Senyo Agyeman's ("Agyeman" or "Respondent") detention and segregation were indeed extraordinary. Agyeman is an immigrant from Ghana

who entered the United States in 1988 and married a U.S. citizen in 1991. In early 1997, Agyeman and his wife were asked to appear for an interview with the Immigration and Naturalization Service ("INS") to ascertain whether their marriage was a *bona fide* one. Because his wife was hospitalized, she was unable to attend the interview, and Agyeman was placed in custody pending the resolution of his visa status.[1] Thus began Respondent's long and beleaguered journey through the American detention and civil justice system.

It should be noted that Petitioners have misleadingly suggested in their Petition that Agyeman was incarcerated as a result of a DUI, or for passing a bad check. (Pet. Br. at 6). This is not the case; Respondent was a civil detainee. His detention related solely to his immigration status, not to any actual or alleged crime. Petitioners have further confused the issue, suggesting that Respondent was not truly innocent because of his alleged use of profanity in his dealings with prison personnel. Petitioners' litany of alleged expletives has no bearing whatsoever on Agyeman's status as a non-criminal detainee—he was not incarcerated for using dirty words.

Respondent spent seven years in custody while his immigration status was litigated. The majority of this time was spent in various prisons operated by Petitioners' employer and co-defendant, the Corrections Corporation of America ("CCA"), a private company employed by the federal government. His time in detention was largely spent in "disciplinary segregation," principally because CCA personnel claimed he was "insolent." Respondent contests Petitioners' version of certain incidents that Petitioner claims justified the placement of Respondent in segregation. For instance, Petitioners claim he "urinated through his cell door," whereas Respondent contends that his toilet clogged and overflowed

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[1] Agyeman's wife subsequently died, leaving Agyeman's visa status unsettled.

through his cell door. In other instances, Respondent contends that he did not make the statements that Petitioners claim.

While Respondent was a *civil* detainee, one would not know it from the conditions of his incarceration. His custodians evidently drew no distinction between civil and criminal prisoners. While not even charged with a crime, Agyeman was placed in the same facilities and was subject to the same regulations and treatment as if he had been a convicted killer. In fact, in disciplinary segregation, the treatment is much closer to what one would expect to be afforded to the most dangerous of criminals than to an innocent man being held for an expired visa. Respondent was kept in solitary confinement, shackled in leg irons and chest chains, and contends he was subjected to physical abuse by guards.

On October 11, 1998, the prison medical personnel at CCA's Central Arizona Detention Center believed that Respondent was experiencing a heart attack, and he was placed in restraints for transport to a medical center. While being transported, he contends he was knocked to the floor by guards for refusing to comply with an order, resulting in several of his teeth being knocked out. In response, Respondent initiated this litigation. He made his first of three requests for the appointment of an attorney at the outset, but his request was denied by the district court.[2]

Agyeman faced overwhelming obstacles in bringing his case. Petitioners state that he filed "many, many pleadings," but the proliferation of pleadings in this case was hardly due to Respondent's legal expertise, as Petitioners suggest. On the contrary, it was Agyeman's failure to understand the legal

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[2] Petitioners misstate the record by claiming that Respondent only asked for counsel once before trial. In all, he made three requests for such appointment—twice in written motions and once in court.

requirements he faced in pleading and bringing his case that led to such numerous filings. It took Plaintiff almost two years of filing motions and amended complaints before he finally submitted a Complaint that was acceptable to the district court, and even then four of his six original counts were dismissed on the pleadings.[3] This Complaint was still critically flawed; as the Ninth Circuit noted, Agyeman mistakenly brought his case against the prison employees under 42 U.S.C. § 1983 when it should have been a *Bivens* action. Petitioners do not deny that had Respondent actually prevailed at trial, they could have moved to set aside the verdict based on this error.

Respondent was further hamstrung by his placement in disciplinary segregation. Petitioners note that Respondent had no access to a law library during his detention at the Maricopa County Jail, but they misleadingly suggest that this problem was eliminated once he was transferred to a prison that did have a library. That is not the case—there may have been a library on site, but Agyeman could not access it. Petitioners neglect to mention that prisoners held in disciplinary segregation must ask for a case or statute specifically, by citation and case name.[4] Only then would a

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[3] Petitioners again dramatically overstate Respondent's legal prowess, suggesting that because he has been a party to eighteen legal proceedings, he is well versed in the law. In fact, the opposite is true. Most of these lawsuits result from Respondent's inability to ascertain how, where, and against whom to assert this case. In his confusion in bringing the instant lawsuit, he filed the same Complaint many times, often in the wrong courts and/or against the wrong parties, and each time it was docketed as a new case. The extraneous filings were eventually dismissed.

[4] *Casey v. Lewis*, 834 F. Supp. 1553, 1556-1557 (D. Ariz. 1992), *injunction rev'd on other grounds, Lewis v. Casey*, 518 U.S. 343 (1996) (noting that prisoners in Arizona prisons, including the Florence Arizona prison in which Agyeman was detained, have no physical access to a law library and are denied law books unless they can provide an exact citation).

particular case or statute be photocopied and given to Agyeman. There are few, if any legal scholars alive that could effectively conduct legal research given these limitations—this is not meaningful access to a law library.

Agyeman faced a host of other impediments, causing him to renew his plea for counsel in a motion on August 24, 2000. He was again denied. In the course of the five year delay between the incident and trial, and moves from one prison to another, many of his legal papers disappeared. He was not permitted to take depositions "because of the logistical problems involved." He was not only unrepresented at his own deposition, he was given no opportunity to submit errata.[5] With no phone, money or internet access, he was effectively prevented from conducting any legal or factual research, and from locating key witnesses. Thus, Respondent was at an insurmountable disadvantage before trial had even begun.

At trial, the scales were tipped still more dramatically against Respondent. He made a third and final plea for appointment of counsel at the outset of trial, but was again denied. Agyeman was thus left to try the case unassisted against opponents represented by "one of the most experienced litigation firms in Arizona [with] unmatched trial and appellate experience."[6] Forced to present his case in an orange jumpsuit, having had no opportunity to conduct discovery and with no legal training, the trial was a losing proposition from the beginning. Respondent made no opening statement, gave no direct testimony, made no evidentiary objections, and, as the Ninth Circuit opinion points out, argued the entire case under the wrong theory of liability.

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[5] Agyeman contends that the court reporter erroneously recorded in his deposition transcript that Agyeman had had "a whole bunch of DUIs." Agyeman had no opportunity to correct this, and this purported testimony was presented by the CCA at trial, with undoubtedly prejudicial effect.

[6] Jones Skelton Hochuli, *http://www.jshfirm.com/* "Welcome," Accessed May 9, 2005.

As could be expected under the circumstances, the CCA and its personnel prevailed. After four days of testimony from which two critical witnesses were absent, the jury rendered a verdict in favor of the defendants on all counts. The appeal and the Ninth Circuit decision followed. The Ninth Circuit, in vacating and remanding, recognized that this case represented extraordinary circumstances meriting the appointment of counsel.

SUMMARY OF THE ARGUMENT

Petitioners have not presented any issue appropriate for review under the Supreme Court's Rules. Supreme Court Rule 10 sets forth the circumstances in which the grant of a petition for a writ of certiorari may be appropriate:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Sup. Ct. R. 10(a).

First, as discussed below, the Ninth Circuit's decision in this case does not conflict with the opinion of any other circuit court. (Also, there is no state court decision involved here, and Petitioners do not allege any conflict with a decision of this Court.) Second, there is no important federal question which must be resolved by the Court. The reach of the Ninth Circuit holding is extremely limited due to the unusual facts of Respondent's case, and there are not sufficiently broad precedential implications to merit this Court's attention. Finally, the Ninth Circuit did not depart from the accepted and usual course of judicial proceedings so

as to warrant review by this Court. The Ninth Circuit applied its customary "exceptional circumstances" test and concluded that Respondent's case did in fact present exceptional circumstances. This conclusion is hardly shocking in a legally complex case in which a non-criminal detainee has been incarcerated for seven years by a variety of government and private entities, had his teeth knocked out by guards while suffering from a heart attack, and was shackled in punitive segregation with no meaningful access to a law library.

For all of these reasons, as well as those set forth below, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT *AGYEMAN* OPINION IS NOT IN CONFLICT WITH ANY OTHER U.S. COURT OF APPEALS ON AN IMPORTANT MATTER

Petitioners complain that different circuits have adopted different factors to be considered when deciding whether to appoint counsel, pleading for "guidance and a firm understanding of a uniform standard" to apply in appointment to counsel cases. Upon closer analysis, however, the differences between the circuits' approaches are trivial at best. The authorities Petitioners cite for the purported "split" are easily reconcilable and reveal that the multi-factor test of the Second, Third, and Seventh Circuits is fundamentally consistent with, and applies the same legal principles as the "exceptional circumstances" test adopted by the Ninth Circuit. While the number of factors and the precise language may vary slightly, all circuits addressing the question of appointment of counsel under 28 U.S.C. § 1915(e)(1) have applied a discretionary analysis aimed at determining an indigent plaintiff's ability to litigate without representation. Imposing a blanket checklist of factors on district courts

evaluating an indigent plaintiff's request for appointment of counsel is unnecessary and impractical.[7]

Nor does the *Agyeman* decision itself illustrate or create a split in the circuits with respect to the appointment of counsel test. Petitioners fail to cite any case involving similar legal and factual issues in which another circuit court affirmed the denial or reversed the appointment of counsel. (Pet. Br. at 14). Contrary to Petitioners' assertions, applying the elements of any circuit's multi-factorial approach to the particular circumstances of Agyeman's detention and the legal and factual complexity of his claims, Agyeman would easily qualify for appointment of counsel. Thus, even if some variation exists among the circuits' approaches to this issue, this particular case is not the appropriate vehicle for resolving such split because it is not in conflict with any decision of another circuit court.

A. There is no Genuine "Split"—All Circuits Apply Consistent Legal Principles When Evaluating Requests for Counsel

The right of access to the courts is a fundamental constitutional right, and fully implementing this right requires that the access granted be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977). Indeed, "meaningful access" is the touchstone for assuring that an indigent litigant has an adequate opportunity to

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[7] Indeed, this Court has already twice denied petitions for certiorari in cases addressing the purportedly conflicting "extraordinary circumstances" test and the Third and Seventh Circuit's multi-factor approach. *Compare Tabron v. Grace*, 6 F.3d 147 (3rd Cir. 1993) (rejecting substantive restrictions that may be imposed district courts' discretion under in favor of multi-factor approach to requests for counsel under 28 U.S.C. § 1915), *cert. denied*, 510 U.S. 1196 (1994); *with Farmer v. Haas*, 990 F.2d 319, 321-322 (7th Cir. 1993) (framing Seventh Circuit's multi-factorial approach in terms of the simpler formation of the Ninth Circuit's "exceptional circumstances" test), *cert denied*, 510 U.S. 963 (1993).

present his claims fairly, and is at the heart of the appointment of counsel analysis under 28 U.S.C. § 1915(e)(1). *See Bounds* at 823; *Hodge v. Police Officers*, 802 F.2d 58, 60 (2nd Cir. 1986) ("Of course, [§ 1915(e)(1)] must be understood to guarantee indigents 'meaningful access' to the courts as required by the Constitution.") (citing *Bounds*, 430 U.S. at 823). While the *Hodge* court acknowledged that "meaningful access" does not always mean granting an indigent plaintiff counsel in civil cases, *id*, in certain situations appointment of counsel is necessary to ensure that an indigent plaintiff can prosecute his claims in an effective and fair manner. *Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1983) (prisoner has a constitutional right to appointment of counsel where the denial of proper representation would result in fundamental unfairness impinging upon prisoner's due process rights); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984), *abrogated on other grounds, Mallard v. U.S. Dist. Court for S.D. Iowa*, 490 U.S. 296 (1989) (reversing denial of request for counsel on basis that it "denied litigant a fundamentally fair trial"); *Merritt v. Faulkner*, 697 F.2d 761, 764 (7th Cir. 1983) ("the circumstances of a particular case may make the presence of counsel necessary").

While Petitioners have fastened upon narrow semantic differences in how different circuits formulate the test, it is clear that all circuits are guided by the constitutional underpinnings of the statute and take a fundamentally consistent approach to assessing requests for counsel under § 1915(e)(1). The mere fact that some chose a simple formulation, while others delineate more fully the individual elements that weigh in the analysis, does not warrant this Court's intervention. Ultimately, the same legal principles guide every district court's discretionary assessment of an indigent litigant's circumstances: whether, based on the particular facts at hand, denial of counsel would impinge the due process rights of the indigent plaintiff. This case-by-case analysis is tailored to address the reality that unique,

differently situated litigants present different due process concerns. *Accord, Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981) ("the decision must rest upon the court's careful consideration of all the circumstances of the case, with particular emphasis upon certain factors that have been recognized as highly relevant to a request for counsel"); *DesRosiers v. Moran*, 949 F.2d 15, 24 (1st Cir. 1991) ("to determine whether there are exceptional circumstances . . . a court must examine the total situation. . .").

A close look at the particular rules and factors applied in different circuits underscores that they are all essentially the same.[8] The first factor to consider in any circuit is the merits of the indigent plaintiff's claim. The Ninth Circuit characterizes this as requiring "at least an evaluation of the likelihood of plaintiff's success on the merits." *Agyeman v. Corrections Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004). This is no different than the requirement in other circuits that the plaintiff make a threshold showing that the claim "has some merit in fact and law." *See Maclin*, 650 F.2d at 887; *Hodge*, 802 F.2d at 60; *Tabron v. Grace*, 6 F.3d 147, 155 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994)

Following an assessment of the merits, every circuit requires district courts to balance the complexity of the indigent plaintiff's case against his ability to represent himself. The criteria evaluated under the multi-factor test include: the plaintiff's ability to investigate the facts, including the extent to which confinement may pose problems; the type of evidence to be presented to the fact finder, favoring appointment of counsel where evidence consists of conflicting testimony and will turn on credibility and hence

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[8] The core similarity of the exceptional circumstances and multi-factor approaches is highlighted by the fact that, as Petitioners note, both the First and Fifth Circuit apply the multi-factor test and call it an "exceptional circumstances" test. *See, e.g., Cookish v. Cunningham*, 787 F.2d 1, 3 (1st Cir. 1986), (Pet. Br. at 16).

the need for effective cross-examination; the plaintiff's ability to represent himself; the difficulty and complexity of legal issues presented; and "any special reason why appointment of counsel would be more likely to lead to a just determination." *See, e.g., Hodge*, 802 F.2d at 60-62 (adopting *Maclin* factors); *Tabron* 6 F.3d at 155-56; *McCarthy v. Weinberg*, 753 F.2d 836, 838-40 (10th Cir. 1985).

Circuits adopting the exceptional circumstances test simply direct district courts to evaluate "the plaintiff's ability to articulate his claims 'in light of the complexity of the legal issues involved.'" *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). However, this second prong of the exceptional circumstances test is clearly just a simpler formulation of the various "additional" factors considered in other circuits, and it is easily construed as encompassing *all* of these individual elements. As Judge Posner has noted, the "other" *Maclin* factors "collapse upon inspection," and the inquiry is essentially whether, given the difficulty of the case, the plaintiff appeared competent to try it himself effectively. *Farmer v. Haas*, 990 F.2d 319, 321-22 (7th Cir. 1993), *cert denied*, 510 U.S. 963 (1993). *See also Whisenant*, 739 F.2d at 163 ("No comprehensive definition of exceptional circumstances is practical. The existence of such circumstances will turn on the quality of two basic factors—the type and complexity of the case, and the abilities of the individuals bringing it.") (quoting *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982)).

Petitioners' characterization of the factors applied in different circuits as "completely different" is preposterous. It is clear from Petitioners' brief itself that the factors are in fact closely-aligned. Indeed, *all* of the cases Petitioners name as exemplifying non-uniform factors cite to, and adopt factors from the seminal *Maclin* decision. This common origin underscores that the factors are indistinguishable in prin-

ciple.[9] Moreover, the *Maclin* court acknowledged that the factors it articulated do not constitute an "exclusive checklist," but rather are elements often found to be significant in the appointment of counsel analysis. *Maclin*, 650 F.2d at 889; *Lockert v. Faulkner*, 574 F. Supp. 606, 608 (N.D. Ind. 1983) (standards for evaluating requests for counsel include, but are not limited to, the commonly cited *Maclin* factors). Thus, one would expect some case-to-case variation in a court's formulation of the factors, focusing on those most relevant to the case at hand.

Finally, it must be noted that Petitioners mischaracterize the Second, Third, and Seventh Circuit tests as affording broader discretion to trial courts considering requests for counsel than courts in other circuits. (Pet. Br. at 13, 15-18).[10] *See also Maclin*, 650 F.2d at 886 (noting that district courts have "broad discretion" to appoint counsel under § 1915(e)(1)). District courts in the Ninth Circuit are given "considerable discretion" in determining whether counsel is necessary. *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 800. How this differs from "broad discretion" eludes the Respondent. Moreover, while grants of a motion for counsel and reversals of those denials are rare, *id.*, neither "con-

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[9] The one exception is *Poindexter v. F.B.I.*, 737 F.2d 1173 (D.C. Cir. 1984), which is unsurprising considering that case analyzed appointment of counsel under 42 U.S.C. § 2000e-5(f)(1) (Title VII), not 28 U.S.C. § 1915(e)(1).

[10] One of the cases Petitioners cite regarding the analysis employed in the Fifth Circuit, like *Poindexter*, does not even discuss 28 U.S.C. § 1915(e)(1). Indeed, Petitioners' do not stop here at erroneously citing authorities that do not actually offer any support for their legal propositions. For example, Petitioners cite *Castillo v. Cook Cty Mail Room Dep't*, 990 F.2d 304 (7th Cir. 1993), as holding that the "trial court erred in failing to *sua sponte* appoint counsel for indigent inmate." (Pet. Br. at 20). The court in fact held only that the trial court erred in *dismissing the plaintiff's claim* and failing to grant him in forma pauperis status, and instructed the trial court to appoint counsel upon remand.

siderable" nor "broad" discretion is absolute. "To say that a district court may exercise discretion is not to say that such discretion is unreviewable." *Maclin*, 650 F.2d at 886 (quoting *Ekanem v. Health & Hospital Corp. of Marion County*, 589 F.2d 316, 319 (7th Cir. 1978)); *see also Hodge*, 802 F.2d at 60 (though broad discretion lies with district court judge, this "does not mean that a court can do whatever it pleases"). In fact, *Agyeman* does not demonstrate a split in the amount of discretion afforded the trial courts. The case just confirms that a district court's failure to consider the indigent plaintiff's unique circumstances, and whether denial of counsel would deny him meaningful access to the courts, does not amount to the exercise of sound discretion under the § 1915(e)(1) analysis.

While Petitioners plead for a "uniform standard" regarding the appointment of counsel, greater uniformity hardly seems desirable. A rigid standard would inevitably detract from the ability of courts to assess and respond to unique circumstances, thereby diminishing the extent to which due process concerns are effectively addressed. For example, Petitioners suggest that the appointment of counsel is never appropriate where a litigant is literate, educated and articulate, regardless of the complexities of the case and other impeding factors. (Pet. Br. at 20). The imposition of such a blanket rule would foreseeably lead to many situations in which litigants are wrongly denied counsel, seriously undermining the core due process objectives underlying the statute.

B. *Agyeman* is Not in Conflict with the Decision of Any Circuit Court

Petitioners present a long string of completely inapposite cases to support the proposition that, for a literate litigant such as Respondent, "every other circuit in the nation would likely have found the denial of counsel to be well within the trial court's discretion." (Pet. Br. at 20). These cases

show nothing of the kind—in fact not one of the Petitioners' cited cases demonstrates any inconsistency with *Agyeman* whatsoever.

First, every case Petitioners cite pertains to a criminal prisoner, thus invoking none of the special concerns arising from Agyeman's civil status that were pivotal to the Ninth Circuit's holding. Second, not one of the cases cited addresses the particular legal complexities at issue, such as the need to comprehend and successfully navigate *Bivens* actions rather than 42 U.S.C. § 1983, the Federal Tort Claims Act and state causes of action. These factors are absent from Petitioners' cited cases but were discussed at length by the Ninth Circuit as a basis for its conclusion in Respondent's case. Third, many of the cases Petitioners cite specifically list as a justification for the denial of counsel the absence of disputed facts and the fact that credibility would not play a major role in the case. *See Cookish v. Cunningham*, 787 F.2d 1, 3-4 (1st Cir. 1986) (facts straightforward and mostly undisputed); *Childs* 705 F.2d at 922-923 (most facts undisputed); *Hill v. Davidon*, 844 F. Supp. 237, 238 (E.D. Pa. 1994) (denying counsel where credibility would not be a large factor in outcome of case); *Davidson v. Goord*, 259 F. Supp. 2d 238, 239 (W.D.N.Y. 2003) (no difficult factual issues). Such cases stand in stark contrast to *Agyeman*, where every determinative fact was hotly contested and the outcome turned on credibility and the ability to conduct effective discovery and cross-examination. Finally, none of the cases Petitioners cite involved a litigant so consistently deprived of access to legal resources. Indeed, several cases rely on the litigant's access to a law library as one factor supporting denial of counsel; but unlike the litigants in those cases, Respondent could not go to the prison library for most of his seven years behind bars. *Cf id.*, at 239 (finding plaintiff could advance § 1983 arguments *based on* reasonable access to prison law library); *Hill*, 844 F. Supp. at 238 (plaintiff's ability to use library upon request supported denial of

counsel). In short, it is absurd for Petitioners to hypothesize that because various courts have upheld the denial of counsel for criminal litigants on completely different facts, "every circuit in the nation" would find that Respondent was not entitled to counsel.

On the contrary, under the factors courts in different circuits consider in the § 1915(e)(1) analysis, Respondent presents a strong case for the appointment of counsel in any court in the nation, even under the purportedly conflicting multi-factor tests of the Second, Third, and Seventh Circuits.

First, Agyeman has met the threshold requirement that his claims have "merit in fact and law." He alleged that prison guards subjected him to excessive force, knocking out several of his teeth, and that he was wrongfully placed in segregation in retaliation for bringing a civil lawsuit against the prison guards. These are colorable claims, as demonstrated by the fact that he was able to bring his case to trial. *Maclin*, 650 F.2d at 887. Indeed, the principal factors militating against his "likelihood of success" all trace directly to his lack of a lawyer: his failure to frame his case properly and his inability to conduct discovery or to effectively cross-examine his well-represented opponents in a battle of credibility.

The remaining "additional" factors similarly weigh in favor of appointing counsel. For example, the Second Circuit will consider the indigent's ability to investigate and present crucial facts, in light of the nature of the factual issues involved and whether the case is "fact intensive." *See Hendricks*, 114 F.3d at 392, 394; *Hodge*, 802 F.2d at 60. *See also Tabron*, 6 F.3d at 156 (analogous factor in Third Circuit is "the ability of the plaintiff to investigate his case," which encompasses the extent of discovery required, complexity of discovery rules, and whether the conditions of the prisoner's confinement disadvantaged him in discovery). Respondent comfortably falls within the ambit of this factor. He was trapped in solitary confinement with no ability to depose

witnesses, conduct discovery, or otherwise investigate the facts necessary to support his case. *Maclin* 650 F.2d at 887 ("Where the indigent is in no position to investigate crucial facts, counsel should often be appointed.")

Another factor weighing in favor of appointing counsel is if "conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder." *Hodge*, 802 F.2d at 61; *Tabron*, 6 F.3d at 156 (analogous factor in Third Circuit is whether the case is likely to turn on credibility determinations); *Maclin* 650 F.2d 888 ("Counsel may also be warranted where the only evidence presented to the fact finder consists of conflicting testimony.") In the case at hand, the evidence consisted almost entirely of conflicting testimony regarding the circumstances of the assault upon Respondent, as well as the reasons for his placement in segregation. Virtually every fact relating to the central claims was contested, pitting Respondent's version of events against that of the guards. Given that this case turned largely on issues of credibility, effective cross-examination by an advocate—and one not wearing an orange jumpsuit—was essential.[11] This factor, however formulated, is easily satisfied.

The last factor generally considered in the Second, Third, and Seventh Circuits is "the complexity of the legal issues raised by the complaint." *Id.*; *Hodge*, 802 F.2d at 61 (court "should be more inclined to appoint counsel if the legal issues

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[11] It is interesting to note, for example, that the guards' reports for the particular incident underlying Respondent's lawsuit contained strange similarities that cause the reader to question whether the reports were prepared independently. Each officer speaks of Agyeman's 'combativeness' and his need for 'soft restraints' and the pressure applied to Agyeman's 'mandibular area.' These similarities are inferential evidence of collusion among the guards against Agyeman, and when presented by a skilled attorney during cross-examination, could have powerfully undermined the defendants' credibility.

presented are complex"); *Tabron*, 6 F.3d at 156 (in conjunction with plaintiff's capacity to present his case, court must consider "the difficulty of the particular legal issues"). The Ninth Circuit conducted an extensive analysis of this point in *Agyeman* and concluded that Respondent's case did present the requisite complexity. Petitioners take issue with their conclusion on this point, but as no other circuit has addressed a case with comparable circumstances, Petitioners can rely on nothing but rank speculation that other circuits would disagree with the Ninth Circuit's finding of complexity here.

Thus, even assuming *arguendo* that the circuits genuinely split on the standard when considering a request for counsel, *Agyeman* does not present the appropriate vehicle for resolving such split because it fully accords with the multi-factorial approach of the Second, Third, and Seventh Circuits. Petitioners' claim that any other circuit would have been "hard pressed" to reverse denial of counsel in this case is wholly unsupported. (Pet. Br. at 17). Rather, Respondent faced a confluence of factual and legal complexities that rendered him unable to effectively articulate his claims, making appointment of counsel necessary under any articulated standard. Under the totality of the circumstances, "denial of the appointment of counsel clearly resulted in a trial which was fundamentally unfair." *McCarthy*, 753 F.2d at 839-40.

C. *Agyeman* is Confined to its Facts and Does Not Present an Important Federal Question

The *Agyeman* opinion addresses a unique situation and is very unlikely to impact the interests of the public at large. This Court has held that "special and important reasons" sufficient to justify a grant of certiorari "imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955). Further, this Court has stated that certiorari should not be

granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." *Id.* at 79. By this standard, *Agyeman* does not present special or important reasons for Supreme Court review.

Petitioners claim that in light of the Ninth Circuit's *Agyeman* opinion "trial courts no longer have any discretion"—because all *pro se* litigants lack legal training, "counsel would have to be appointed in every case." (Pet. Br. at 14). Petitioners have grossly miscast the opinion. It does not open a Pandora's Box of litigious prisoners all now entitled to counsel, but rather addresses one man's right to representation in light of a particularly complex, egregious, and likely very rare, fact scenario. When the circumstances at issue are examined, it is apparent that at most a handful of cases could fall within the scope of this opinion.

First, Respondent was a civil detainee. He was not imprisoned as a result of any actual or alleged crime, but rather was "detained" pending the resolution of his visa status, a purely civil matter. Because his non-criminal status was a major factor rendering appointment of counsel appropriate, the precedential scope of this case is quite limited. *Agyeman*, 390 F.3d at 1104 (noting that Agyemen's status as a noncriminal detainee "enhanced his rights" beyond those of an ordinary criminal prisoner). This holding does not control cases in which a *criminal* prisoner is seeking appointment of counsel, which comprise the vast majority of prisoner litigation. Second, the Ninth Circuit's holding is further confined to the unique legal complexities of Agyeman's case, which are described at length in the opinion. Respondent was forced to navigate unassisted through a morass of state and federal law: Section 1983, *Bivens* actions, the Federal Tort Claims Act, state tort actions—all to be construed in light of the standard of treatment for non-criminal detainees. Finally, Respondent was uniquely ham-

pered in bringing his lawsuit by his placement in segregated detention, where he had no access to the basic legal resources necessary to pursue his case. This is another significant factor distinguishing Agyeman's case from that of ordinary prisoners who do have access to a prison law library.

In short, the Ninth Circuit opinion is based upon a fact pattern that is, one hopes, extremely unusual—a man never convicted of a crime, imprisoned for seven years, barred from visiting the prison law library, provided no opportunity to conduct adequate discovery, yet attempting to prosecute a highly complex case against multiple defendants without the assistance of counsel. The number of civil detainees in circumstances comparable to Agyeman's cannot be so great that, even if all were appointed counsel for such cases, there would be any perceptible impact on court resources. Petitioners have offered no evidence of a proliferation of such litigants. Until it appears that this is more than a rare occurrence, Petitioners have not articulated an important federal question that merits this Court's attention.

While Petitioners argue that appointment of counsel for litigants such as Agyeman "will likely" drain courts of resources, it is clearly not a burden on courts that Petitioners fear.[12] They seek rather to avoid legal defense costs and liability for their own treatment of detainees. Without having to face a represented opponent, Petitioners have a preponderous advantage in their dealings with indigent civil

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[12] It is at least as probable that appointment of counsel would relieve courts of the burden of processing certain complex cases such as this one brought by untrained indigent litigants. For example, here, appointment of counsel would have spared the district court two years of reviewing and dismissing numerous inexpertly drafted versions of Agyeman's Complaint. *See e.g. Hendricks*, 114 F.3d at 393 (where a pro se litigant faces substantial problems developing the record in the face of complex issues, the appointment of counsel serves the interests of the court as well as the litigant).

detainees such as Agyeman. There is virtually no danger of liability for any offenses committed by prison personnel where an indigent plaintiff such as Respondent must proceed with no ability to investigate facts, no ability to conduct legal research and no attorney. While Petitioners understandably seek to preserve their advantage, insulating private prisons from liability for the mistreatment of civil detainees is not an important federal matter worthy of a grant of Certiorari.

II. THE NINTH CIRCUIT'S DECISION WAS NOT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Petitioners' dissatisfaction with the result notwithstanding, the Ninth Circuit did in fact adhere to the well-articulated standard for appointment of counsel that has guided courts in the Ninth Circuit for some time. As discussed above, while this standard is expressed somewhat differently, it is fundamentally consistent with the standards adopted by other circuits addressing the issue.

Petitioners first create a new standard that is not and never has been the law in any circuit: that district courts may always deny the appointment of counsel if the litigant is literate and does not suffer from some physical or mental impairment. (Pet. Br. at 19-20). Petitioners then attack the Ninth Circuit for departing from this non-existent rule. However, they cannot point to any case stating that courts are so narrowly limited that they may *only* consider physical, mental, or language impairments when deciding whether to appoint counsel, and such an interpretation would not comport with the plain language of the statute. § 1915(e)(1) ("The court may request an attorney to represent *any person* unable to afford counsel.") (emphasis added). Contrary to Petitioners' novel view, circuit courts admonish trial courts to consider a *range* of factors and circumstances, and where necessary to look beyond the enumerated factors to consider

"any special reason in a case why appointment of counsel would be more likely to lead to a just determination." *Hodge* 802 F.2d at 61-62; *McCarthy*, 753 F.2d at 838 (trial courts are to give careful consideration to *all* circumstances when considering appointment of counsel requests); *Hendricks v. Coughlin*, 114 F.3d 390 (2nd Cir. 1997) (reversing denial of counsel in § 1983 action; even though plaintiff was a "self described jailhouse lawyer," who had successfully navigated legal system in past lawsuits, analysis of all circumstances showed that he was not equipped to present case adequately in this instance). In short, suggesting that the Ninth Circuit erred by considering other factors diminishing Respondent's ability to present his case is a ludicrous basis for a challenge of the *Agyeman* ruling; the Ninth Circuit was entirely correct to consider the totality of circumstances.

Petitioners then complain that the Ninth Circuit improperly transformed itself into an advocate, raising arguments and strategies in its opinion that Respondent had not presented when proceeding *pro se*. The Ninth Circuit was not serving as a biased advocate in identifying the claims Respondent could and should have asserted. Rather, it was identifying basic, glaring legal errors Respondent made in pursuing his case in order to illustrate the complexities and legal pitfalls at issue here and the extent to which, notwithstanding his literacy, Agyeman was ill-equipped to pursue his case unaided. Moreover, Respondent's point on appeal was that he was unable to bring his case effectively because he was not represented in a complex case. Petitioner merely proves this point by emphasizing that Respondent failed to raise key arguments at the trial level. It would compound the initial injustice if Respondent were forever locked into the inadequately framed claims he asserted as an unrepresented litigant.

The court did not overstep its proper bounds by noting the arguments Agyeman should have made were he better versed

in the law. Contrary to Petitioners' characterization of the proper role of courts (Pet. Br. at 21), "it is the recognized duty of the trial court to insure that the claims of a pro se client are given a 'fair and meaningful' consideration." *Childs*, 705 F.2d at 922; *see also Strickler v. Waters*, 989 F.2d 1375, 1389 (4th Cir. 1993) (while court need not act as an advocate for a litigant, legitimate advisory role includes responsibility of ensuring that technical problems, such as those of pleading, do not prevent prosecution of pro se suits); *Hendricks* 114 F.3d at 393 (when court is forced into uncomfortable role of advocate, it serves interests of justice to appoint counsel).

Petitioners finally take issue with the Ninth Circuit's assessment of the complexities of Respondent's case. The *Agyeman* opinion sets forth a detailed analysis of these complexities, including the need to bring the lawsuit against the prison employees as a *Bivens* action, the potential action against the United States under the Federal Tort Claims Act, and the issue of whether he was entitled to a different standard of treatment as a result of his status as a civil rather than a criminal detainee. Other courts have reversed the denial of counsel based on the litigant's failure to understand his complex civil rights claims. *See Hendricks*, 114 F.3d at 394-95; *Abdul-Wadood v. Duckworth*, 860 F.2d 280, 289 (7th Cir. 1988) (legal and factual issues presented by §1983 claim "evidently exceeded" plaintiff's abilities, though they did not seem complex at first glance). While Petitioners disagree about the degree of complexity presented, the Ninth Circuit's analysis was thorough and in keeping with the application of the "exceptional circumstances" standard. In finding complexity here, the opinion hardly departs from the accepted course of judicial proceedings so as to merit this Court's review.

In conclusion, the Ninth Circuit correctly applied its well-established standard to a case that is on its face extraordinary.

Agyeman does not alter the high degree of discretion accorded to district courts; it merely confirms the established principle that the exercise of discretion is not unreviewable.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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